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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re Loretta L. et al., Persons Coming Under the Juvenile Court Law.	
TULARE COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. ROSEMARY F., Defendant and Appellant.	F046111 (Super. Ct. No. JD54343) **O P I N I O N**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Charlotte Wittig, Commissioner.

Maureen L. Keaney, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen Bales-Lange, County Counsel, and John A. Rozum, Deputy County Counsel, for Plaintiff and Respondent.

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[*] Before Dibiaso, Acting P.J., Vartabedian, J., and Buckley, J.

Rosemary F. appeals from orders terminating her parental rights (Welf. & Inst. Code, § 366.26) to her eight-year-old daughter and five-year old son.[1] She contends the court erred by finding her daughter Loretta adoptable and by rejecting her (appellant's) claim that both children would benefit from a continued relationship with her. On review, we will reverse as to Loretta and affirm as to appellant's son.

PROCEDURAL AND FACTUAL HISTORY

In March 2002, the Tulare County Superior Court adjudged Loretta and her younger brother dependent children of the court and removed them from appellant's custody. The court exercised its dependency jurisdiction under section 300, subdivision (b) over the children in large part because: appellant did not or could not adequately protect them from domestic violence between her and the younger child's father. In addition, appellant's substance abuse rendered her unable to provide the children with regular care.

In the meantime, respondent Tulare County Health and Human Services Agency (the agency) placed the children with their maternal grandparents while appellant made efforts to reunify. Notably, appellant and the younger child's father could only have supervised visits with the children. Despite 12 months of services, appellant was unable to reunify. In February 2003, the court terminated reunification efforts as well as set a permanency planning hearing (§ 366.26).

The agency initially recommended a permanent plan for legal guardianship for the children with the grandparents as legal guardians. However, questions arose regarding the grandparents' care. In particular, it appeared and the agency later confirmed that the grandparents had permitted repeated unsupervised and sometimes overnight visits between the children, appellant and the younger child's father. Consequently, in the

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

summer of 2003, the agency removed the children from their grandparents' home, placed the children in separate foster homes, and withdrew its legal guardianship recommendation. The agency subsequently recommended the court select long-term foster care as the children's permanent plan. The children's current caregivers were unwilling to adopt and the full extent of the children's behaviors was unknown due to the short amount of placement time.

In July 2003, the court selected long-term foster care as its permanent plan for the children with a goal of placing them together and establishing a legal guardianship. As of mid-August 2003, the agency was able to place the children together.

Sometime in November 2003, the children had been moved to yet another foster home where, in the social worker's estimation, they thrived. It was apparently on that basis the agency recommended in a November review report that the court set a new section 366.26 hearing for the children. The children's special advocate meanwhile expressed concern regarding the new foster parents' appropriateness. The family already had adopted five children. The special advocate expressed a preference for the children to be placed in a home where they were the only children.

The court continued the review hearing into early January 2004 at which point it asked the agency to investigate the older child Loretta's feelings towards adoption. Thereafter, the social worker conveyed the meaning of adoption to the girl, who in turn stated definitively that she wanted to remain in her current home. She loved them and they were nice to her. She was also pleased with the idea of adoption, especially when she understood she would not be going back to live with her grandparents. Eventually, the court set a new section 366.26 hearing for May 2004.

In its section 366.26 report prepared in early May, the agency identified adoption as the goal for both children, but did not recommend termination of parental rights. The agency deemed appellant's son adoptable if the court found it in his best interests to be separated from Loretta. The foster parents with whom he and Loretta had lived for the

last six months were committed to adopting him. However, they did not feel the same about Loretta. The foster parents were unable to commit to Loretta, whom they wished to have removed following the end of the school year, due to her continued aggressive behavior, including sexually acting out with other children in the home. As long as Loretta received "all the attention" she was happy, but when someone else got attention, she started to act out. She hit the other children in the home, including her brother, and stole both at home and school. According to the social worker, she could not appropriately assess Loretta's adoptability until there was a better understanding of the child's issues and functioning ability.

In this regard, the social worker reported Loretta was attending a program focusing on socialization skills and commencing grief and loss group therapy through Porterville Youth Incorporated (Porterville). The agency apparently had referred Loretta and her brother to Porterville after the foster parents in late 2003 reported sexually acting out behavior by the two. The agency also scheduled Loretta for a clinical assessment regarding attachment issues. At that point, she was in her fifth placement since her original detention. Further, due to her struggles with her schoolwork, she had been referred to the Central Valley Regional Center, as well, for a developmental evaluation.

In early June, the social worker filed the completed attachment disorder assessment with the court. According to the assessment, Loretta was a very likeable little girl who had had little stability in her eight years. She exhibited anxiety, poor concentration, some symptoms of depression, many symptoms of attention deficit disorder, and many symptoms of oppositional defiant disorder. She also had many behaviors of attachment disorder: she lacked cause-and-effect thinking; she did not learn from her mistakes; and she did not "'get it'" in most instances. In addition, Loretta had a need to be in control of most situations, a result attributable to her lack of trust and fear over what would happen to her. Further, the child exhibited mild symptoms of anti-social behaviors although she was consciously trying very hard to be "'good.'" The clinician

who conducted the assessment also reported Loretta was drug-exposed in utero and traumatized by the domestic violence she had witnessed and neglect, if not abuse, she suffered.

Meanwhile, the foster parents reported Loretta's behavior had improved in May. She seemed to be really trying to fit into the family. The foster parents were willing to keep her in their home if she could maintain her behavior. They were also open to adoption if her mental health stabilized.

By mid-June, circumstances once again had changed. The agency reported to the court that Loretta had made significant progress through counseling in dealing with her emotions and negative behaviors and the foster parents were willing to proceed with adoption planning for both children. Because the agency was consequently recommending termination for both children, the court again continued the section 366.26 hearing to late July in order to assure appellant's due process rights.

However, the foster family's interest in adopting Loretta was unfortunately short-lived. In July 2004, they gave seven-days notice that they wanted Loretta removed from their care due to recent aggressive behavior on her part. The agency nevertheless identified Loretta as well as her younger brother as adoptable.

The court eventually conducted the section 366.26 hearing which is the subject of this appeal in late July. At that hearing, the mother contested the termination recommendation based on her claimed relationship with her children. Following appellant's testimony and argument by counsel, the court found the children adoptable and terminated parental rights.

DISCUSSION

Loretta's Adoptability

Appellant challenges the court's finding that Loretta was likely to be adopted if it terminated parental rights. The issue of adoptability posed in a section 366.26 hearing focuses on the child, e.g., whether his or her age, physical condition, and emotional state

make it difficult to find a person willing to adopt the child. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) On this record it appears until the foster parents expressed a commitment to adopting Loretta, the agency did not have enough information to consider her adoptable. Thereafter, when the foster parents withdrew, the agency still characterized Loretta as adoptable. However, on this record, we cannot conclude there was substantial evidence to support such a finding.

Although the juvenile court must make its adoptability finding by clear and convincing evidence (§ 366.26, subd. (c)(1)), the "clear and convincing" standard of proof is not a standard for appellate review (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750). The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal. (*Ibid.*)

As this court explained in *In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379, in juvenile dependency cases, the power of an appellate court asked to assess the sufficiency of the evidence begins and ends with a determination as to whether or not there is any substantial evidence, whether or not contradicted, which will support the conclusion of the trier of fact. All conflicts must be resolved in favor of the respondent and all legitimate inferences indulged in to uphold the decision, if possible. In that sense, we give full effect to respondent's evidence, however slight, and disregard appellant's evidence, however strong. (*Sheila S. v. Superior Court* (1995) 84 Cal.App.4th 872, 881.) However, even applying these deferential standards to the record before the trial court, we are unable to affirm the court's adoptability finding as to Loretta.

For the first time throughout the length of the child's dependency, the social worker in mid-June 2004 recommended termination and adoption for Loretta. The social worker explained she felt Loretta had made significant progress through counseling in dealing with her emotions and negative behaviors. Further, the foster parents had stated

their willingness to go forward with adoption planning for both children. The social worker added that the prospective adoptive family, with whom Loretta had lived for more than six months, had a true and realistic understanding of her mental health issues and were committed to the plan of adoption.

A month later, the foster parents changed their minds about adoption and requested that the agency remove Loretta from their home on a week's notice. And why was that? Her aggressive behavior had re-emerged. Loretta reportedly tried to hit both adults and hit and yelled at the other children in the home.

Nonetheless, the social worker "still identifie[d] Loretta as an adoptable child." The social worker reported a maternal aunt stated she and her husband would love to have Loretta in their home and would consider adopting her. Because the aunt lived out of state, the social worker started the process for an interstate evaluation of her home. The social worker also identified two to three non-relative families whom she claimed would be interested in adoptive placement of Loretta. No further details were offered, apart from the fact the social worker explained to the families interested in Loretta that on-going sibling contact, presumably between her and her younger brother, should occur.

Frankly, we do not know what to make of the social worker's conclusory claim that Loretta was still adoptable. There had finally come a point when the social worker believed Loretta was adoptable based on her progress in dealing with her emotions and negative behaviors and the fact the foster parents, who had a true and realistic understanding of her mental health issues, were committed to adopting her. However, a month later, Loretta's adoptability equation, so to speak, had significantly changed. Those same foster parents were out of the picture and the extent of Loretta's progress was at least in doubt.

While it is not necessary that a dependent child already be in a potential adoptive home or that there be a proposed adoptive parent "waiting in the wings" (*In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223, fn. 11), in this case, the social worker clearly based her

adoptability assessment in large part on the foster family's willingness to adopt Loretta. Loretta's recent attachment assessment certainly did nothing to advance an opinion that she was adoptable.

We readily acknowledge the fact that foster parents change their minds about adopting a child in their care does not necessarily undermine an adoptability determination. The change of heart may speak more about the foster parents, their level of commitment and their suitability than about the child. However, while that could be the situation here, we cannot reasonably draw such an inference on this appeal. First, the record is silent in that regard. Second, part of the social worker's reason for characterizing Loretta as adoptable was these foster parents' commitment to adopt her in the face of her mental health issues.

Further, we fail to see how the fact that the social worker identified families who would be interested in adoptive placement of Loretta adequately substitutes for or is the equivalent of her former foster parents' commitment to adopt her. First, we do not know what meaning to attribute to the social worker's statement that she identified families interested in adoptive placement. The record is once again silent in this regard. We note that respondent claims the social worker's "record of success was known to the trial court," as though the social worker's identification of families was some guarantee of Loretta's adoptability. However, there is nothing in the record to support such a claim. Second, and perhaps more importantly, missing from the record is any evidence that these recently identified families had any understanding of Loretta's circumstances, let alone her mental health issues, save for the need for ongoing sibling contact.

Finally, we observe that respondent urges in its appellate argument "that when [Loretta] received individual attention[,] she behaved, thrived and achieved" and "[i]n a home with fewer or no [children], there is every expectation that Loretta could not only fit in but blossom and thrive as her need for individual attention is met." Even were we to assume all of this were true, there is simply no evidence that any of the families the

social worker identified could provide such individual attention or had fewer or no other children in their homes.

We are admittedly troubled by the possibility that the social worker could have resolved some or all of these questions in favor of a factually-supported adoptability finding had the issue been contested. However, it remained the agency's burden to prove the likelihood of Loretta's adoptability (§ 366.26, subd. (c)) and on this record, we cannot find substantial evidence to support the conclusion.

Of course, months have passed since the trial court made its adoptability finding as to Loretta. Perhaps in the interim, Loretta has made such progress that the agency may be able to establish she is generally adoptable or the agency may have successfully placed her into a prospective adoptive home committed to her adoption. In any event, it remains the agency's burden on remand to prove it is likely Loretta will be adopted.

No Detriment

Appellant also contends the court erred when it declined to find termination would be detrimental to the children's best interests. She claims she was entitled to such a finding because she presented evidence that she had maintained regular visitation and contact with her children and they would benefit from continuing the relationship (§ 366.26, subd. (c)(1)(A)). Although we concluded there was no substantial evidence to support the adoptability findings as to Loretta and thus will reverse the judgment in her case, we will review appellant's claim as to both children.

Although section 366.26, subdivision (c)(1) acknowledges that termination may be detrimental under specifically designated circumstances, a finding of no detriment is not a prerequisite to the termination of parental rights. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.) Thus, when a juvenile court rejects a detriment claim and terminates parental rights, the appellate issue is not one of substantial evidence but whether the juvenile court abused its discretion. (*Id.* at p. 1351.) On review of the record, we find no abuse of discretion.

Once reunification services are ordered terminated, the focus shifts to the needs of the children for permanency and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) A section 366.26 hearing is designed to protect children's compelling rights to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child. (*In re Marilyn H., supra,* 5 Cal.4th at p. 306.) If dependent children are likely to be adopted, adoption is the norm. Indeed, the court must order adoption and its necessary consequence, termination of parental rights, unless one of the specified circumstances provides a compelling reason for finding that termination of parental rights would be detrimental to such children. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.)

> "The specified statutory circumstances--actually, *exceptions* to the general rule that the court must choose adoption where possible—'must be considered in view of the legislative preference for adoption when reunification efforts have failed.' (*In re Jasmine D., supra,* 78 Cal.App.4th at p. 1348.) At this stage of the dependency proceedings, 'it becomes inimical to the interests of the minor to heavily burden efforts to place the child in a permanent alternative home.' (*Cynthia D. v. Superior Court* [(1993)] 5 Cal.4th [242], 256.) The statutory exceptions merely permit the court, in *exceptional circumstances* (*In re Jasmine D., supra,* at pp. 1348-1349) to choose an option other than the norm, which remains adoption." (*In re Celine R., supra,* 31 Cal.4th at p. 53.)

In this case, appellant no doubt established that she maintained regular visitation with her children throughout their dependency. However, her claim that the children shared a significant emotional relationship at least in the early stages of these dependency proceedings did not compel the juvenile court to find that termination would be detrimental to them.

> "The exception in section 366.26, subdivision (c)(1)(A), requires that the parent-child relationship promote the well-being of the child to such a degree that it outweighs the well-being the child would gain in a permanent home with new, adoptive parents. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) A juvenile court must therefore: 'balance[] the strength and quality of the natural parent/child relationship in a tenuous placement

> against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.' (*Id*. at p. 575.)" (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1342.)

Here no such evidence was introduced. We therefore conclude the juvenile court properly exercised its discretion in rejecting appellant's claim.

DISPOSITION

The order terminating parental rights is affirmed as to appellant's son. The order terminating parental rights is reversed as to Loretta for a limited remand on the issue of the likelihood of the child's adoption.